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# in the Supreme Court of the United States

**OCTOBER TERM, 1971**

**No. 71-677**

JAMES MELVIN WILCOX,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, James Melvin Wilcox, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 9, 1971.

## OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix. The judgment and commitment entered by the United States District Court for the Southern District of Florida is unreported and appears in the appendix.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 9, 1971. A timely petition for rehearing was denied on October 20, 1971. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

## QUESTIONS PRESENTED

I

Whether the Court of Appeals improperly restricted the scope of inquiry as to the reasons the Government witness was invoking the privilege against self-incrimination where he had pled guilty to the same offense as is here in question and had testified fully at a prior trial.

II

Whether the Government witness by pleading guilty, by being convicted of the same offense as is here in question and by fully incriminating himself by his prior trial testimony is estopped from invoking the Fifth Amendment.

III

Whether the Government's admission that its key witness has the right to invoke the Fifth Amendment since it is "a fact that he could commit perjury" by testifying at the third trial wholly discredits the witness' credibility so that the dignity of the United States Government will not permit the conviction based on the tainted first trial testimony.

## CONSTITUTIONAL PROVISION INVOLVED

The pertinent part of the Fifth Amendment to the Constitution of the United States provides:

> "No person *** shall be compelled in any criminal case to be a witness against himself ***."

## STATEMENT OF THE CASE

Petitioner, Wilcox, was indicted in 1966 for transfering counterfeit reserve notes with knowledge of their unauthenticity in violation of 18 U.S.C. § 473. In 1967 Wilcox was convicted by a jury of the counterfeiting charge.

During his first trial, Maruzewski, the Government's chief witness and the party to whom Wilcox allegedly had transferred the counterfeit notes, gave testimony which gravely inculpated both Wilcox and himself.[1]

The bulk of Maruzewski's testimony at the first trial concerned his relationship with Wilcox and their subsequent arrangement whereby Maruzewski would be supplied with counterfeit bills from Wilcox on a consignment basis.

Maruzewski's highly incriminating testimony was to the effect that he was forwarded $10,000 in counterfeit currency by Wilcox, all in twenty dollar bills. The former

[1] Inasmuch as the Fifth Circuit's opinion sets forth most of the pertinent facts and proceedings, the Statement of the Case is supported by the opinion.

then journeyed through Louisiana and up to Detroit, Michigan, passing the bills until he was apprehended by federal agents in Detroit, Michigan. At the time of his arrest he was still in possession of some of the illicit currency.

Subsequently Maruzewski was returned to Fort Lauderdale to assist in the investigation and apprehension of Wilcox. Pursuant to a telephone conversation, Maruzewski went to Wilcox's house. He was accompanied by an agent Rivers, who posed as "Mad Dog", an alleged friend of Maruzewski. During this visit Maruzewski handed a number of counterfeit bills to Wilcox, who accepted them and put them in an envelope.

At the time Maruzewski testified to the foregoing in 1967, during the first trial, *he had already pleaded guilty as an accomplice to the counterfeiting charge here in dispute. Also, he had already been convicted and paroled.* After being paroled, he commenced serving a sentence in a state prison for another unrelated, intervening counterfeiting conviction. Because of the intervening state conviction, the Federal authorities revoked Maruzewski's parole in the instant offense and placed a detainer on him.

As a result of Maruzewski's "devastating testimony", which was corroborated in part by the secret service agents as to what occurred after Maruzewski's arrest, Wilcox was convicted of the counterfeiting charge. On appeal the Court of Appeals reversed the first conviction for improper cross-examination of certain character witnesses and remanded the cause for a new trial. *Wilcox v. United States*, 5 Cir. 1967, 387 F.2d 60.

A new trial was held, but it terminated in a mistrial at the time of opening argument to the jury because counsel for one of the parties mentioned that Maruzewski was not present and would not appear to testify.

## Improper Invocation of the Fifth Amendment

When this case came on to be tried for the third time the Government's prosecutor advised the District Judge of Maruzewski's reluctance to testify. Accordingly, the Court convened a post-voir dire, pretrial conference to attempt to determine whether the witness intended to invoke the privilege against self-incrimination and whether the witness had a valid reason for doing so. At the commencement of this hearing the District Judge stated that Maruzewski had an absolute right to invoke the Fifth Amendment.[2] Defense counsel disagreed and objected to the position taken by the court.[3]

In reply to defense counsel's argument, the prosecutor admitted candidly that Maruzewski could commit perjury if he were to testify.[4]

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[2]"THE COURT: 'Well, I would normally be of the opinion that having once testified he has waived the Fifth Amendment. The cases, seem to hold differently. They seem to hold that even though a witness has testified in one proceeding, if the case come back and is retried, he has an absolute right at the next trial to invoke the Fifth Amendment. That is what I say the law is." *U.S.A. v. Wilcox*, Appendix A, footnote 10.

[3]Defense counsel argued that Maruzewski must have "a reasonable ground to believe that his testimony will have the tendency to incriminate him. And he has already served his time on everything that is connected with this case." Ibid.

[4]Ibid.

The Court of Appeals assumed that the District Judge believed that Maruzewski was afraid that the testimony he would give at the third trial would show that he gave false testimony at the first trial, since the Judge in his exchange with counsel stated that the invocation of the Fifth was not available if the witness were afraid that he would perjure himself by testifying at the third trial.[5]

Notwithstanding the Court's statement that the privilege was not available to Maruzewski if he were afraid that he would perjure himself at the third trial, defense counsel was prohibited from making any inquiry during his examination of Maruzewski as to whether or not his fear of committing perjury in the third trial was the reason he was claiming the protection.[6]

Next, defense counsel attempted to ascertain if Maruzewski's reason for invoking the privilege was fear of further prosecutions by the Government in connection with his counterfeiting activities.[7] Although Maruzewski stated that he was not fearful of government prosecution at this time, an attempted profer by defense counsel to have Government counsel state in the record, or as a witness, that the latter has no knowledge of any kind that there is any intention on the Government's part to

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[5] Id., at footnote 11.

[6] "[Defense Counsel]: Is one of your concerns which has caused you to seek to invoke the Fifth Amendment and refuse to testify possible prosecution and punishment for perjury?

"[Prosecutor]: I would like to voice an objection to the question. I don't believe it is relevant to these proceedings.

"THE COURT: I will sustain the objection ***." (R 29)

[7] *U.S.A. v. Wilcox*, Appendix A, footnote 7.

prosecute the witness for any crime that might be involved as a result of his testimony was denied by the Court at the Government's behest.[8]

Finally, the Government admitted that its "questions [would] be along the same line, to cover the same material that was covered in the original examination."[9]

Because the District Judge incorrectly permitted Maruzewski to invoke the Fifth Amendment privilege against self-incrimination, the latter became unavailable as a witness at the third trial, and his testimony from the first trial was read into the record before the jury.

## REASONS FOR GRANTING THE WRIT

### I

THE SUPREME COURT HAS JURISDICTION TO REVIEW BY CERTIORARI A DECISION OF THE COURT OF APPEALS ACCEPTING THIS COURT'S DECISION IN *HOFFMAN v. UNITED STATES*, 1951, 341 U.S. 479, AS CONTROLLING PRECEDENT BUT ATTRIBUTING TO THAT DECISION AN ERRONEOUS PRINCIPLE OF LAW RESULTING IN THE CREATION OF A CONFLICT OF OPINION AND AUTHORITY.

*Hoffman v. United States*, 341 U.S. 479, 95 L.Ed. 1118, 71 S.Ct. 814, provides the guidelines for a District

[8] Ibid.

[9] Id., at footnote 8.

Judge to determine the incriminating effect of an answer where a witness invokes the privilege against self-incrimination. First, Hoffman makes it abundantly clear that the witness, upon interposing his privilege, is not required to prove why an answer might incriminate since this would compel him to surrender the very protection which the privilege is designed to guarantee. Id., at p. 1124.

Since the Court cannot directly inquire of the witness as to the nature of the danger he senses, *Hoffman* provides that the witness must make it evident from the implications of the question in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. Ibid. Thus, under the principles announced in Hoffman, the witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself, it is for the Court to determine whether the witness has reasonable cause to apprehend danger from a direct answer. Ibid.

Accepting the principles of law announced in *Hoffman, supra*, and the further principle that the trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence, the Fifth Circuit attributed to the decision an erroneous and unfounded principle of law as follows: In analyzing the circumstances that the District Judge considered in ruling upon the witness' claim of privilege in *Hoffman, supra*, the Fifth Circuit noted that the recalcitrant witness in *Hoffman* was being sought for his connection with crimes being investigated by the Grand Jury, and answers to the Grand Jury's questions would have a strong possibility of implicating the witness

for some of the crimes under investigation. Also, in *Hoffman*, the conclusion of potential incrimination was buttressed by the Judge's knowledge that the witness had a long police record and was widely recognized as a key member of the organized criminal underworld.

Then, the Fifth Circuit found that the District Judge in analyzing the circumstances in ruling upon Maruzewski's claim had knowledge that Maruzewski had been convicted of another counterfeiting offense; that Maruzewski's counsel had advised him that there were other offenses for which he could be prosecuted; that Maruzewski's chief occupation involved the evasion of criminal laws. Further, the Judge was cognizant of the Government's refusal to disclose whether or not it had plans to prosecute Maruzewski after Wilcox's third trial. Upon the foregoing circumstances, the Fifth Circuit erroneously concluded that a further inquiry as to Maruzewski's reasons for fearing possible incrimination would be impermissible under *Hoffman*, *supra*, in view of the substantial danger of incrimination.

In appraising the claim of the privilege in the case, *sub judice*, the facts and circumstances are strikingly dissimilar from those in *Hoffman*, except that Maruzewski and the *Hoffman* witness were involved in criminal activities. In the case, *sub judice*, Maruzewski had pled guilty to the same counterfeiting charge facing Wilcox. The former had already testified fully at the first trial and had incriminated himself.

To the contrary, the witness in Hoffman was under investigation, had not been indicted, had obviously not pleaded guilty and had not voluntarily incriminated himself by testifying. Thus, inquiry as to the reasons for invoking the privilege in Hoffman, was necessarily re-

stricted to protect the witness in the exercise of his Fifth Amendment right, which had never been waived.

It is apparent that this Court never intended in the *Hoffman* decision to limit unduly the scope of inquiry as to the reasons a (Government) witness attempts to invoke the privilege against self-incrimination where he has already pleaded guilty to the very offense, which he is being called to testify about and which offense he has testified about at a prior trial.

Other facts present in the case, *sub judice*, and absent from *Hoffman* are that the Government raised the possibility of Maruzewski committing perjury if he testified and that the Government was deliberately silent as to possible prosecutions of Maruzewski if he were to testify at the third trial. Further important facts peculiar to this case are the Government's revocation of Maruzewski's parole and the Government's admission that it would seek to elicit essentially the same testimony as Maruzewski revealed in the first trial.

Therefore, the Fifth Circuit applied an erroneous and unfounded principle of law to *Hoffman*. For the Hoffman decision does not compel a restricted inquiry as to the reasons Maruzewski made his claim. Under the principles announced in *Hoffman*, inquiry should have been permitted as to whether or not the Government intended to prosecute Maruzewski if he testified at the third trial, as to whether or not Maruzewski invoked his privilege because of dissatisfaction with the Government's revocation of his parole and the detainer placed on him, and as to whether Maruzewski was afraid that he would perjure himself when he testified at the third trial.

Quite plainly, conflict of opinion has been demonstrated justifying the grant of certiorari to review the judgment and opinion of the Fifth Circuit. Further, the erroneous principles of law announced by the Fifth Circuit demonstrate the need in this important area of Federal law for this Court, by further elucidation, to set forth the extent of inquiry permissible to establish the incriminating effect of an answer where the witness invokes the privilege against self-incrimination.

## II

## THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS AS TO THE WAIVER OF THE PRIVILEGE AGAINST SELF-INCRIMINATION AFTER A PLEA OF GUILTY AND A CONVICTION.

It is well established that once a witness has been convicted for the transactions in question, he is no longer able to claim the privilege of the Fifth Amendment and may be compelled to testify. *United States v. Romero*, 249 F.2d 371, 374-375 (2 Cir. 1957). The Supreme Court of the United States in *Reina v. United States*, 364 U.S. 507, 5 L.Ed. 2d 249, 81 S.Ct. 260, approved the holding in *Romero* "that once a person is convicted of a crime he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime * * *."

To the same effect is the case of *United States v. Hoffman*, 385 F.2d 501, 504 (7 Cir. 1967), where the Court held that conviction of an accomplice under a plea of guilty

divested the accomplice of his Fifth Amendment right to refuse to testify concerning the transactions and events involved and subjected him to being called by the Government as a witness against his co-accomplices.[10]

Notwithstanding the applicability of the above authorities as to the effect of Maruzewski's plea of guilty, his conviction and prior testimony, the Fifth Circuit held that Maruzewski's situation was only a waiver as to the "exact words stated on the first trial."

Certainly, the District Judge should have required Maruzewski to testify at the third trial and, at least, to answer every question that was asked at the first trial. Maruzewski could still claim the privilege whenever a question was presented concerning a matter not involved in the first trial which would give rise to a reasonable danger of further incrimination in light of all the circumstances. Cf. *Rogers v. United States*, 1950, 340 U.S. 367, 95 L.Ed. 344.

Thus the Fifth Circuit's decision, which approved Maruzewski's invocation of the Fifth Amendment, subsequent to his plea of guilty to the same crime charged against Wilcox, subsequent to his conviction and subsequent to his prior incriminating testimony, directly collides with prior decisions of this Court and of other Courts of Appeal, necessitating the granting of Certiorari to review the judgment below.

[10]By a plea of guilty a defendant admits all the elements of the crime with which he has been charged and thereby waives several of his constitutional rights, including, at least in some measure, his privilege against compulsory self-incrimination. McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969); Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

## III

## THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN *MESAROSH V. UNITED STATES*, 352 U.S. 1, AS TO WHETHER THE CONVICTION WAS OBTAINED ON TAINTED TESTIMONY.

This Court in *Mesarosh v. United States*, 352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1, was confronted with the admission of the Solicitor General that a witness in the case gave testimony in other proceedings which was probably untrue. Therefore, the Court in passing on the integrity of a criminal trial in the Federal courts held that where the Solicitor General indicates the unreliability of a Government witness and thus wholly discredits such witness' credibility, the dignity of the United States Government will not permit the conviction of any person on the tainted testimony of such a witness.

Notwithstanding the application of the principle in *Mesarosh* to the admission by the Government prosecutor that Maruzewski "could commit perjury" were he called to testify, the Fifth Circuit called the perjury issue a "Red Herring" and omitted any reference to *Mesarosh*.

The Fifth Circuit held that Maruzewski was not entitled to claim the privilege if he were afraid that he would perjure himself when he testified at the third trial. Thus the Fifth Circuit found that the District Judge probably assumed that the witness was afraid that the testimony he would give at the third trial would reveal that he gave false testimony at the first trial.[11]

[11] *U.S.A. v. Wilcox*, Appendix A, footnote 11.

Without indulging in a game of semantics, the prosecutor's statement that Maruzewski "could commit perjury" if he testified at the third trial indicates that the Government considered Maruzewski to be an unreliable witness. Therefore Maruzewski's refusal to answer whether he was invoking the Fifth Amendment because of a fear of being charged with perjury taken together with the Government's own admission that Maruzewski could commit perjury has so "poisoned the water in this reservoir [that] the reservoir cannot be cleansed without first cleaning it of all impurity." *Mesarosh v. United States, supra.*

Not only should certiorari be granted on the basis of conflict of decisions; but it should be granted also to enable this Court to exercise its supervisory jurisdiction over trial proceedings, which "polluted" the "waters of justice" by the use of a Government witness whose credibility was placed in issue by the Government. *Mesarosh v. United States, supra.*

## CONCLUSION

For the foregoing reasons and authorities, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was mailed to the Solicitor General, Department of Justice, Washington, D.C., this ____ day of November, 1971.

_____